Supreme Court, U.S.
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No. 92-714

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FRANCIS GEORGE HINKLEMAN,
Petitioner

v.

SHELL OIL COMPANY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do tendering of checks that are dishonored upon presentment and maintaining insufficient funds in a bank account designated for electronic drafts constitute one or more occurrences of an event which is relevant to the franchise relationship and as a result of which termination of the franchise is reasonable under 15 U.S.C. § 2808 (b) (2) (C)?

II. Do the prohibitions contained in Section 11-204 (a) (5) of Maryland's Commercial Law Article regarding discriminatory provision of services or facilities apply to leases of real estate?

LIST OF PARTIES

The following entities are subsidiaries of Shell Oil Company that are not wholly owned:

GRAVACP, Inc.

Loop, Inc.

Agripro Biosciences Inc.

Pecten Middle East Services Company

Plumbing Claims Group, Inc.

CRI Far East Trading Company Limited

Catalyst Recovery Europe S.A.

CRI-SAM, Ltd.

Nippon CRI, LTD.

Pecten Cameroon Company

Al Furat Petroleum Company

Columbia LNG Corporation

East Texas Salt Water Disposal Company

Cortez Capital Corporation

Van Salt Water Disposal Company

Dixie Pipeline Company

Locap, Inc.

West Shore Pipe Line Company

Premix/E.M.S. Inc.

Inland Corporation

Mesbic Financial Corporation of Houston

Oil Insurance Limited

Saudi Petrochemical Company

CRI International, Inc.

CRI Europe S.A.

Catalyst Technology Europe S.A.

Catalyst Technology S.A.R.L.
Criterion Catalyst Company
Pecten Portugal Company S.A.R.L.
Taranaki Offshore Petroleum Company Limited
Shell Frontier Oil & Gas Inc.
Grande Ecaille Land Company, Inc.
Shell Frontier Services Inc.
Butte Pipe Line Company
Explorer Pipeline Company
Plantation Pipe Line Company
Wolverine Pipe Line Company

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner George Hinkleman is a former owner of a service station franchise with Shell Oil Company ("Shell") located in Pasadena, Maryland. Hinkleman became a franchisee of Shell in 1986 when Shell bought the Atlantic Richfield Company stations in the area. At that time, the parties entered into a dealer agreement and a lease for the service station premises. The parties renewed both contracts in November 1988. (JA 81-106)

During the period September 21, 1989 to March 16, 1990, Hinkleman made five late payments of gasoline and

rent to Shell. Three late payments were checks returned for insufficient funds. Those insufficient funds checks were given in exchange for loads of gasoline. The price of a single load of gasoline is substantial. For example, taking the three late payments for gasoline Hinkleman made from September 1989 to March 16, 1990, the average price per load was $9,744.78. (JA 509).[1]

Hinkleman delayed rectifying his payment problems. The dishonored check of September 21 was not replaced with a certified check for over a month. While that payment was outstanding, Hinkleman still owed Shell approximately $1,500.00 on his trade statement for promotional and other materials. The balance had been outstanding for over a year.[2] Later in October, when Shell attempted to withdraw Hinkleman's monthly rent, the electronic draft failed for insufficient funds. By the end of October 1989, Hinkleman's indebtedness to Shell from the trade statement, the petroleum products delivered in September, and the rent overdraft had climbed to more than $15,000.00. (JA 111, 118).

Nevertheless, Shell took no precipitous action. It negotiated with Hinkleman and his attorney, resolved the trade account problem, and eliminated its requirement that Hinkleman pay for gasoline by certified check. However, on November 30, 1989, Shell issued a warning to Hinkleman that "a termination notice will be issued in the event that we experience any further incident of indebtedness with you." (JA 119-121). A month later, Hinkleman tested Shell's resolve.

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[1] The high price of a load of gasoline is just one reason that Hinkleman's payment record cannot be fairly compared to those of other dealers to whose records Hinkleman alluded. (Petition for Writ of Certiorari, hereafter "Pet.," at 6). Those dealers' late payments related to rent or trade statement obligations. *Id.*

[2] Hinkleman disputed only two minor items on the entire bill. (JA 293-294).

On December 25, 1989, Hinkleman wrote a check in the amount of $9,590.46 to Shell for a gasoline delivery. The check was returned by the bank for insufficient funds. Shell presented the check for payment on January 2, 1990, the first business day after the New Year's holiday. Consistent with Shell's prior warning, it notified Hinkleman on January 4, 1990, that it was terminating the franchise.

The late payments did not stop with the notice of termination. On January 9, 1990, Hinkleman wrote a check in the amount of $10,195.70 in payment for delivery of petroleum products which was dishonored for insufficient funds. On March 16, 1990, Shell was unable to withdraw Hinkleman's monthly rent from his bank account because the account's funds were insufficient to cover the payment.

Before the termination was to take effect, Hinkleman filed suit and moved for a preliminary injunction from the United States District Court for the District of Maryland to prevent the termination. His theory then is similar to what it is now: Hinkleman's failure to pay timely is unimportant and his termination was unreasonable because he replaced bounced checks, because he thinks his payment history was not as grievous as that of others, because his failure to pay timely stemmed from Shell's failure to reduce his contractually agreed upon rent by manipulating its Variable Rent Program against him, and because Shell deliberately tried to 'catch' Hinkleman in a payment problem by cashing at the same time two of the checks he had written to Shell.

After a hearing, the District Court[3] denied Hinkleman's motion for a preliminary injunction.[4] Hinkleman filed an amended complaint adding a count under the

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[3] Then Chief, now Senior, United States District Judge Alexander Harvey, II, presided.

[4] Shell had consented to entry of the temporary restraining order.

Maryland Antitrust Act based upon Shell's Variable Rent Program. Upon Shell's Rule 12(b)(6) motion, the District Court dismissed Hinkleman's claim under the Maryland Antitrust Act. Following a hearing, it granted Shell's motion for summary judgment on a claim brought under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* ("PMPA"). The Fourth Circuit affirmed per curiam the District Court's grant of summary judgment on the PMPA claim. It affirmed the District Court's dismissal of the Maryland Antitrust Act claim by a two-to-one vote. Hinkleman petitioned for a rehearing. Shell opposed the petition. On July 28, 1992, the Fourth Circuit Court of Appeals denied Hinkleman's Petition for Rehearing by a vote of nine to three. Hinkleman has now petitioned this Court for a Writ of Certiorari. Shell opposes the Petition.

REASONS FOR DENYING THE WRIT

I. THE PMPA CAUSE OF ACTION.

A. Resolution of the Conflict Is Irrelevant to the Ultimate Outcome of This Case.

This case is a poor vehicle for review of the standard which the courts of appeal should apply in determining whether termination of the service station franchise was lawful under the PMPA. 15 U.S.C. § 2802. Among the courts of appeal, there are two views on how to approach a termination of a service station franchise for failure to pay timely under the PMPA. One view is to regard termination for failure to pay in a timely manner (§ 2801(c)(8)) as a per se ground for termination of the franchise. The other requires that terminations for late payment be independently examined for reasonableness. The outcome of this case will not be affected by a resolution of the conflict. In granting Shell's motion for summary judgment, the District Court concluded as a matter of law that Shell's termination of the Hinkleman franchise was reasonable and lawful under the statute regardless of the test used. (Pet. at C9) Therefore, under either

view, termination of the Hinkleman franchise is lawful under the PMPA.

B. The Apparent Split of Authority Among the Circuits on Which Test to Apply Has Made Little Difference In This Area.

The conflict among the Circuits regarding what test to apply to determine whether a termination of a franchise is lawful is more apparent than real. Since the PMPA was enacted in 1978, there have been only a handful of reported cases dealing with the issue of failure to pay timely.[5] Of those, even among the Circuits that apply a reasonableness test, not one has overturned a termination.

Operation of the statute as a whole may have harmonized the two positions. Before it applies either test under Section 2802(c), a court must first decide whether there has been a "failure." The Act defines "failure" by eliminating "(A) any failure which is only technical or unimportant to the franchise relationship; or (B) any failure for a cause beyond the reasonable control of the franchisee." 15 U.S.C. § 2801(13). Thus, despite a technical difference in approaching Section 2802(c), the definition of "failure" in Section 2801(13) may have had the practical effect of bringing together the two positions. The Fourth Circuit Court of Appeals recognized this point when it observed that "[a] specific, limited reasonableness requirement is incorporated into the statute through section 2801(13)...." (Pet. at A10).

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[5] They are: *Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509 (6th Cir. 1989); *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565 (11th Cir. 1987); *Sun Ref. & Mktg. Co. v. Rago*, 741 F.2d 670 (3d Cir. 1984); *Moody v. Amoco Oil Co.*, 734 F.2d 1200 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984); *Baker v. Amoco Oil Co.*, 761 F. Supp. 1386 (E.D. Wis. 1991), *aff'd*, 956 F.2d 639 (7th Cir. 1992); *California Petroleum Distribs. Inc. v. Chevron U.S.A. Inc.*, 589 F. Supp. 282 (E.D.N.Y. 1984); *Cantrell v. Exxon Co. U.S.A.*, 574 F. Supp. 313 (M.D. Tenn. 1983); and *Loomis v. Gulf Oil Corp.*, 567 F. Supp. 591 (M.D. Fla. 1983).

C. The Fourth Circuit's Decision Is Not An Extension of the Per Se Termination Rule.

Hinkleman characterizes the Fourth Circuit's opinion as an extension of the per se rule of termination. (Pet. at 13-14). He argues that by rejecting the view of some courts which had considered the issue of pretext, the Fourth Circuit somehow extended the per se termination interpretation. (Pet. at 13). Hinkleman is wrong. The Fourth Circuit's opinion is indistinguishable from those of the other courts adopting the per se analysis. It adopted without change the position of the Eleventh Circuit Court of Appeals in *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565 (11th Cir. 1987) and of the Second Circuit Court of Appeals in *Russo v. Texaco*, 808 F.2d 221, 223 (2d Cir. 1986), among others, on the issue of reasonableness per se. (Pet. at A12).

Furthermore, Hinkleman never explains how the Fourth Circuit's opinion purportedly differs from that of other cases adopting the per se rule. Rather, he compares the Fourth Circuit's decision to *another* group of cases—not one of which concerns termination for late payment and all but one of which arises out of a nonrenewal situation.[6] On closer inspection, these cases merely establish the propriety of the pretext analysis when the PMPA explicitly provides for an inquiry into whether the franchisor acted in good faith.[7] No such

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[6] The only case cited by Hinkleman that applies a pretext analysis outside the nonrenewal context is *Gilderhus v. Amoco Oil Co.*, 470 F. Supp. 1302 (D. Minn. 1979). *Gilderhus* dealt with the factually distinguishable situation of franchisor who had been sued by the franchisee to enforce his rights under the contract. The franchisee was terminated during the course of litigating his claim.

[7] Those situations are embodied in four subsections of the PMPA: nonrenewal or termination because of withdrawal from the geographic territory § 2802(b)(2)(E); nonrenewal because of failure to agree to changes or additions to the contract § 2802(b)(3)(A)(i); nonrenewal because of an economic decision to buy, sell, convert or discontinue the premises § 2802(b)(3)(D); and termi-

provision applies to this case.[8] Thus, it is Hinkleman who is seeking an unfounded extension of current law.[9]

Alternatively, Hinkleman urges the Court to liken the PMPA to civil rights statutes and to adopt a pretext inquiry in "the absence of language mandating such inquiry. . . ." (Pet. at 15). In essence, he would have the Court impose a duty of good faith over and above the duty to comply with the statutory requirements for termination. Such a construction would thwart rather than further Congress' intent regarding the PMPA. *Smoot v. Mobil Oil Corp.*, 722 F. Supp. 849 (D. Mass. 1989); *W & S, Inc. v. Atlantic Richfield Co.*, Bus. Franchise Guide (CCH) ¶ 8207 (N.D. Cal. 1984).

Unlike civil rights legislation, which broadly outlaws discriminatory conduct without enumerating what action can and cannot be engaged in, the PMPA sets forth specific grounds for termination and affirmative notification requirements the franchisor must follow before the termination will be deemed lawful. By incorporating these guidelines into the statute, Congress already has established protection from discriminatory or arbitrary terminations for franchisees. S. Rep. No. 731, 95th Cong., 2d Sess. 15, 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 874. *See Desfosses v. Wallace Energy, Inc.*, 836 F.2d 22,

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nation or nonrenewal based upon the franchisor's loss of right to grant the use of the trademark § 2802(c)(6). *See generally Smoot v. Mobil Oil Corp.*, 722 F. Supp. 849, 856 (D. Mass. 1989).

[8] Scrutiny of the franchisor's motive might make sense when the termination or nonrenewal results from actions taken by the franchisor, as it does in the four subsections containing the good faith requirement. When, as here, termination arises from the conduct of the franchisee, "[t]he . . . conduct can be objectively measured against the requirements of 15 U.S.C. § 2802(b)(2)." *Crown Central Petroleum Corp. v. Waldman*, 515 F. Supp. 477, 485 (M.D. Pa. 1981), *aff'd*, 676 F.2d 684 (3d Cir. 1982); *Smoot*, 722 F. Supp. at 857.

[9] In any event, the District Court found that the record did not support Hinkleman's claim of pretext. (Pet. at C15).

25 (1st Cir. 1987) (PMPA establishes minimal federal standards governing termination). To go further would upset the balance between the interests of franchisors and franchisees that Congress placed in the statute and undermine Congress' intent to preserve "the legitimate needs of the franchisor to be able to determine a franchise . . . based upon certain actions of the franchisee, including certain failures to comply with contractual obligations. . . ." S. Rep. No. 731, 95th Cong., 2d Sess. 15, 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 874, 877. For these reasons, the courts below correctly rejected Hinkleman's construction of the statute. *See* Pet. at A9-10 and C15.

II. THE MARYLAND ANTITRUST ACT.

A. The Issue Presented Affects Only One State.

Hinkleman has made only one antitrust claim against Shell. The claim is based upon an alleged violation of the Maryland Antitrust Act, Md. Com. Law Art. § 11-204 (a)(5). Thus, the only issue that would be before this Court on review of the Fourth Circuit's opinion affirming dismissal of Count II of the Complaint is the proper construction of a Maryland statute. Contrary to Hinkleman's suggestion, there is no issue presented under the Robinson-Patman Act.[10] Since there is no Robinson-Patman claim before the Court, any ruling on the proper interpretation of that Act would be dicta and so of little assistance to the courts below. *See Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821) (lack of weight to be afforded dictum).

The issue actually presented in this case is whether Section 11-204(a)(5) of Maryland's Commercial Law Article applies to leases of real estate. The only matter

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[10] The Robinson-Patman Act is a popular name given to § 2 of the Clayton Act. In the United States Code, it appears at 15 U.S.C. § 13. Section 2(e) of the Robinson-Patman Act is 15 U.S.C. § 13(3). For simplicity, references to the federal statute will be to § 2(e) and the Maryland statute to § 11-204(a)(5).

this Court can determine is whether the Court of Appeals correctly concluded it does not. This Court avoids second-guessing a court of appeals on the proper interpretation of state law. *See Haring v. Prosise*, 462 U.S. 306, 313 (1983).

B. The Fourth Circuit Applied State Law.

Seeking to expand the narrow issue of whether the Fourth Circuit correctly applied Section 11-204(a)(5) of the Maryland antitrust statute, Hinkleman asserts that the Fourth Circuit's decision amounted to "federal pre-emption" of state legislation. His assertion is wrong both as a matter of procedure and substance.

Although the Fourth Circuit applied standards and principles derived from the Robinson-Patman Act, it did so solely to interpret analogous state law.[11] The Fourth Circuit determined whether the state law, which it recognized as controlling, differed from the corresponding section under the federal Robinson-Patman Act. (Pet. at A14, n.8). Having considered—and rejected—the notion that the Maryland Act, by its terms, included real estate leases within its scope, the Fourth Circuit eliminated any distinction which could be drawn between the Section 2(e) and § 11-204(a)(5), and then properly proceeded to analyze the claim under the developed body of federal law. *See* Section 11-202(a)(2).[12]

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[11] The Fourth Circuit's reliance on the body of law interpreting the Robinson-Patman Act was proper. The Maryland Antitrust Act provides that the law was enacted to complement the body of federal antitrust laws (Md. Com. Law Code Ann. § 11-202(a)(1).) Further, the Act directs that federal court interpretations guide interpretation of the Maryland antitrust laws. *Id.* at Section 11-202(a)(2).

[12] Analysis for federal preemption proceeds in the reverse direction. To determine if a state law is preempted, the Court first must focus on the federal law to determine Congress' intent regarding its scope. Then it proceeds to analyze the state law to determine whether or not there is a conflict. *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1986).

Hinkleman may quarrel with the outcome of the Fourth Circuit's analysis regarding the significance or lack of significance of the presence of the word "leasing" in the definition of the word "service" under the Maryland Act,[13] but he cannot convincingly maintain that the issue was not considered.[14] For this reason and the reasons that follow, Hinkleman lacks any basis for claiming that Fourth Circuit "has essentially preempted the Maryland Act in favor of its restrictive RPA interpretation." (Pet. at 24).

C. The Interpretations of the Robinson-Patman Act the Fourth Circuit Used As a Guide Are Well Established.

Hinkleman takes the Fourth Circuit Court of Appeals to task for interpreting Section 2(e) of the Robinson-Patman Act in such a way as to limit its scope to prohibiting discrimination through advertising, merchandising and promotional services or facilities. The Fourth Circuit's interpretation hardly was novel. It followed decades of interpretative precedent provided by federal

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[13] It is noteworthy that when the judges of the Fourth Circuit voted on Hinkleman's Petition for Rehearing on July 28, 1992, the two judges from Maryland (Judges Niemeyer and Murnaghan) voted to deny the Petition. (Pet. at E1). Typically, this Court defers to interpretations of the Court of Appeals as the expert tribunal on state law issues for states that are in the circuit. *See Butner v. United States*, 440 U.S. 48, 58 (1979).

[14] In any event, based on the statutory structure, there is considerable question whether the statutory definition of "service" applies to § 11-204(a)(5). Moreover, if it does apply, the only effect of § 11-204(a)(2) is to describe the broad range of items that can constitute a "service" within the statute as a whole. In no way does the definition override limitations that properly restrict the term in a particular subsection. Where, as here, Section 11-204(a)(5) is limited to services principally intended to promote resale; the definitional section does not bring within its ambit a "service" (such as a lease of real estate) that has no connection to resale.

courts and the Federal Trade Commission [15] and the language, history and purpose of the Act.

In particular, the Court of Appeals relied on a long line of precedent holding that Section 2(e) relates solely to services and facilities that are promotional. *E.g.*, *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1317 (9th Cir. 1979); *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 910-11 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); and *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819, 851 (N.D. Tenn. 1974). Other cases are in accord: *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1424 (11th Cir. 1990) (advertising and promotional programs are services and facilities); *John Peterson Motors, Inc. v. General Motors Corp.*, 613 F. Supp. 887, 898 (D. Minn. 1985) (aimed at advertising, merchandising and other promotional services); *Herbert R. Gibson*, 95 F.T.C. 553, 725, *modified*, 96 F.T.C. 126 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) ("the service . . . must be promotional in nature, such as for advertising").

The Federal Trade Commission has made the same determination in its *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 16 C.F.R. §§ 240.1-240.15 (1992).[16] The Guides unequivocally state that Section 2(e) applies "only to" a seller who . . .

> (4) Furnishes promotional services or facilities to a customer

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[15] The Federal Trade Commission has the authority to enforce the Federal Trade Commission Act and its views are to be accorded respect by the courts. *FTC v. Borden Co.*, 383 U.S. 637, 640 (1966).

[16] The Commission promulgated these Guides in 1969 at the invitation of the Supreme Court in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 362 (1968). They were revised in 1972 and 1990. They are sometimes called the "Fred Meyer Guides."

> (5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's product.

Further, the Guides state that promotional services or facilities:

> . . . have not been exactly defined by the statute or in decisions. One requirement, however, is that the services or facilities be used primarily to promote the resale of the seller's product by the customer. Services or facilities that relate primarily to the original sale are covered by section 2(a). The following list provides some examples—the list is not exhaustive—of promotional services and facilities covered by sections 2(d) and (e):
>
> Cooperative advertising;
> Handbills;
> Demonstrators and demonstrations;
> Catalogues;
> Cabinets;
> Displays;
> Prizes or merchandise for conducting promotional contests;
> Special packaging, or package sizes.[17]

Hinkleman's reliance on the decision in *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 587 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) is misplaced. In the twenty-one years since it has been decided, not only has no other court adopted its reasoning, but the Seventh Circuit has apparently retreated from the position it had announced in *Centex*. *Compare Kirby v. P.R. Mallory & Co.*, 489 F.2d 904 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974) (distinguishing indirect price discrimination with promotional discriminations). In short, the Fourth Circuit Court of Appeals' interpreta-

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[17] 16 C.F.R. § 240.7 (1992). In the forty-five years since the Robinson-Patman Act was enacted, a real estate lease has never been found to fall within the scope of Section 2(e).

tion of the Robinson-Patman Act is entirely in accord with well-recognized federal authorities and provides no basis for review.

CONCLUSION

For the foregoing reasons, Shell respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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